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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339  
)  
) Div. 6  
)  
) **MOTION TO PRECLUDE**  
) **WITNESSES, FOR ATTORNEY'S**  
) **FEES AND FOR OTHER**  
) **SANCTIONS, INCLUDING**  
) **DISMISSAL OF THE DEATH**  
) **PENALTY**  
)  
) (Oral Argument Requested)

22 **MOTION**

23 Steven DeMocker, by and through counsel, hereby respectfully requests the  
24 following relief: 1) that the Court order the State to pay attorney's fees and costs for  
25 defense interviews of witnesses the State does not intend to call at trial; 2) that the Court  
26 preclude the State from offering witnesses it schedules defense interviews for without  
27  
28

FILED  
YAVAPAI COUNTY, ARIZONA

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CLERK

B. Hamilton

BY: \_\_\_\_\_

1 providing the defense with the witness' reports and interviews in advance of the  
2 interviews; 3) that the Court order the State to pay attorney's fees and costs for defense  
3 interviews of witnesses who will have to be re-interviewed based on the State's failure  
4 to provide timely disclosure in advance of the interviews; and 3) for other sanctions, to  
5 include dismissing the death penalty, based on the State's repeated violations of Rule  
6 15.1 and this Court's Orders, including maintaining a witness list of 140 fact witnesses  
7 replete with irrelevant witnesses the State does not intend to call at trial, therefore  
8 wasting limited defense time and resources. This motion is based on the Due Process  
9 Clause, the Confrontation Clause, the Eighth Amendment and Arizona counterparts,  
10 Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following  
11 Memorandum of Points and Authorities.

### 12 13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14  
15 Rule 15.1 requires the State to disclose a list of witnesses that the prosecutor  
16 intends to call at trial. On November 17, 2009, the Court ordered the State to cull down  
17 its witness list of over 230 people to identify who the State is likely to call at trial. The  
18 Court ordered the State to complete this process by November 25, 2009, to facilitate  
19 defense interviews. The defense received a witness list with handwritten markings  
20 identifying approximately 132 fact witnesses that the State said it was likely to call, as  
21 well as 17 experts. Since then, with less than three months to trial, the State added  
22 additional witnesses and experts for what is now a total of 141 witnesses and 27 experts.

23 Counsel have been attempting to schedule defense interviews of the State's  
24 witnesses. This process has been impeded by the State's slow and obstructive  
25 disclosure process that has been the subject of other defense motions. However, in early  
26 February the defense sent a list of witnesses we requested to interview, derived from the  
27 State's latest witness list. The State then arranged for the interviews by notifying the

1 defense of the date, time and location of the interviews. The State scheduled interviews  
2 of eight witnesses for February 25, 2010, at the County Attorney's Office in Prescott, to  
3 include the interviews of K. Potts, Det. J. Jarrell and Capt. Steve Francis. To prepare  
4 for these interviews, defense paralegals reviewed the mountains of State disclosure and  
5 a defense investigator traveled to Prescott from Phoenix to attend and record these  
6 interviews. Mr. Sears also attended one of these interviews. These interviews were  
7 recorded and will be transcribed.

8 Two of these interviews were of witnesses who are irrelevant to the case but who  
9 were left on the State's witness list in violation of Rule 15.1 and this Court's Order. Mr.  
10 Potts is an animal control officer who was called to the scene and left once he learned  
11 that the victim's animals were being cared for by neighbors. He never even saw the two  
12 animals. When asked why he was on the State's witness list, Capt. Francis said "the  
13 only thing I can figure is there were a couple times I went out to the scene basically just  
14 to check on my folks to see if they needed water, Gatorade, food, things like that." He  
15 went back to the crime scene several days later, but only to find out about the Gilbert  
16 Police Department's Blue Star equipment to determine if the Yavapai County Sheriff's  
17 Office might be interested in purchasing the equipment. The State's blatant disregard of  
18 the Court's Order to meaningfully narrow its witness list and its waste of valuable  
19 defense (not to mention law enforcement) resources and time with less than three  
20 months to go in a death penalty case that has been pending for over 16 months is  
21 shocking. The time it would take for the State to eliminate meaningless and irrelevant  
22 witnesses from its witness list is minimal, particularly when compared to the wasted  
23 time and expense this exercise cost in terms of law enforcement, the defense, and the  
24 State. This Court should impose strong sanctions against the State for its conduct in  
25 failing to narrow its witness list as required by Rule 15.1, failing to comply with this  
26 Court's Order to narrow its witness list and wasting defense and law enforcement  
27

1 resources with irrelevant interviews. The defense requests that this Court order the  
2 State to pay Mr. Sears' fees and the fees and costs of the defense investigator, Rich  
3 Robertson for preparation and attendance at these pointless interviews as well.

4 Det. Jimmy Jarrell was also scheduled by the State for an interview on February  
5 25, 2010. The defense engaged in the same preparations for this interview. It was  
6 disclosed during the interview that during the past four to six weeks, Det. Jarrell  
7 conducted evidence review and interviews regarding the death of James Knapp. He  
8 obtained Mr. Knapp's medical records from a family member and obtained Prescott  
9 Police records, including death scene photos. Finally, he wrote reports that have not  
10 been disclosed to the defense and that he did not bring to the interview. Therefore, his  
11 interview was incomplete and the defense likely will be required to interview him again.  
12 The State was aware of Det. Jarrell's interviews and reports and yet failed to disclose  
13 these in advance of this interview. The State scheduled the date and time of the  
14 interview without disclosing that these reports were completed and undisclosed. It was  
15 not until during the interview that the defense discovered that these Det. Jarrell's reports  
16 existed. The State should be precluded from calling Det. Jarrell.

17 Additionally, this incident shows the State is being both obstructive and  
18 duplicitous. Det. Jarrell apparently conducted his interviews starting in mid-or-late-  
19 January, including requesting that Mr. Knapp's brother provide the State with his  
20 deceased brother's medical records. The brother eventually sent those to Det. Jarrell.  
21 Yet, when the defense sought a court order, in compliance with the federal privacy laws,  
22 the State, knowing full well that it was also seeking, if not already possessed, the same  
23 information, it aggressively opposed the motion in writing and in open court on  
24 February 19.

25 The defense is overwhelmed with the State's obviously unculled 141 witness list  
26 and now the State apparently cannot be bothered to disclose the reports of its witnesses  
27  
28

1 in advance of the interviews it schedules. The defense cannot possibly be prepared for  
2 trial in less than three months if it has to interview irrelevant witnesses and interview  
3 relevant witnesses multiple times. This is a death penalty case. It has been pending for  
4 sixteen months. There is no excuse for the State's conduct which can, at best, be  
5 described as incompetent and, at worst, as obstructive of Mr. DeMocker's right to due  
6 process, a fair trial and to confront the evidence against him.

7 Rule 15.7 permits the Court to impose any sanction it finds appropriate where a  
8 party violates the disclosure required under Rule 15. *See* Ariz. R. Crim. P. 15.7(a). A  
9 trial court has broad discretion in fashioning a sanction and will not be found to have  
10 abused its discretion "unless no reasonable judge would have reached the same result  
11 under the circumstances." *See State v. Armstrong*, 208 Ariz. 345, 354, 93 P.3d 1061,  
12 1070 (2004) (citing *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.  
13 18 (1983)). The trial court must take into account, in determining the appropriate  
14 sanction, "the significance of the information not timely disclosed, the impact of the  
15 sanction on the party and the victim, and the stage of the proceedings at which the  
16 disclosure is ultimately made." Ariz. R.Crim. P. 15.7(a). The Rule specifically  
17 contemplates exclusion of evidence as a sanction. *Id.* (a)(1). The court "must order  
18 disclosure and impose sanctions unless it finds that the failure to disclose was harmless,  
19 or could not have been disclosed earlier even with due diligence and the information  
20 was disclosed immediately upon discovery." *See State v Newell (Milagro)*, 221 Ariz.  
21 112, 210 P.3d 1283 (1 CA-SA 09-0052, Court of Appeals filed June 2, 2009).

22 The United States Constitution requires that "extraordinary measures [be taken]  
23 to insure that the [Accused] is afforded process that will guarantee, as much as is  
24 humanly possible, that [a sentence of death not be] imposed out of whim, passion,  
25 prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (*quoting*  
26 *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed,  
27

1 "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that  
2 might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383,  
3 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan,  
4 J., concurring in part and dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419,  
5 422 (1995) (noting that the Court's "duty to search for constitutional error with  
6 painstaking care is never more exacting than it is in a capital case.") (quoting *Burger v.*  
7 *Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the  
8 guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

9 As the defense has noted elsewhere, the cumulative effect of the State's repeated  
10 and continuing violation of the Court's orders and of Rule 15.1 should lead to the  
11 dismissal of the death penalty. This is only more true today. At a certain point, the  
12 State's imposed mockery of justice must be put to a stop. The Arizona Supreme Court  
13 has identified the trial judge as the person responsible for giving effect to the Rules  
14 governing the discovery process and giving meaning and effect to sanctions. Rule 15.7  
15 accords the Court broad discretion to impose a sanction. Striking the death penalty as a  
16 sanction for repeated violations of the Rules of Criminal Procedure and Court orders is  
17 not a sanction that could possibly result in a finding of an abuse of discretion. The  
18 Court should strike the death penalty and stop the mockery the State has made of this  
19 process.

## 20 CONCLUSION

21 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
22 Court prohibit the State from offering testimony of Det. Jarrells, order the State to pay  
23 attorney's fees and costs and investigator's fees and costs for the above mentioned  
24 interviews and strike the death penalty as a sanction for the State's outrageous conduct  
25 in this case.  
26  
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28

1 DATED this 26<sup>th</sup> day of February, 2010.

2  
3 By: 

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12 Attorneys for Defendant

13 **ORIGINAL** of the foregoing hand delivered for  
14 filing this 26<sup>th</sup> day of February, 2010, with:

15 Jeanne Hicks  
16 Clerk of the Court  
17 Yavapai County Superior Court  
18 120 S. Cortez  
19 Prescott, AZ 86303

20 **COPIES** of the foregoing hand delivered this  
21 this 26<sup>th</sup> day of February, 2010, to:

22 The Hon. Thomas B. Lindberg  
23 Judge of the Superior Court  
24 Division Six  
25 120 S. Cortez  
26 Prescott, AZ 86303

27 Joseph C. Butner, Esq.  
28 Prescott courthouse basket

